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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 FACEBOOK, INC.,

14 Plaintiff,

15 v.

16 POWER VENTURES, INC., a Cayman Island
corporation and d/b/a POWER.COM, a
17 California corporation; STEVE VACHANI, an
individual; DOE 1, d/b/a POWER.COM,
18 DOES 2-25, inclusive,

19 Defendants.

Case No. 5:08-CV-05780 LHK

**NOTICE OF MOTION AND MOTION
FOR LEAVE TO FILE MOTION FOR
RECONSIDERATION OF COURT'S
ORDER FOR SUMMARY JUDGMENT
(DKT. NO. 275)**

Dept: Courtroom 8, 4th Floor
Judge: Hon. Judge Lucy H. Koh

NOTICE OF MOTION AND

MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that pursuant to Northern District of California Civil Local Rule 7- 9(b), Defendants Power Ventures, Inc. (“Power”) and defendant Steven Vachani acting *pro se* (“Defendants”) hereby move this Court to grant them leave to file a motion for reconsideration of Honorable Judge Ware’s February 16, 2012 Order Regarding Motions for Summary Judgment. *See* Docket No. 275 (hereinafter “Order”). As per Rule 7-9, Defendants assert that for the reasons discussed below, the Order constituted “A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order,” as well as conclusions of law counter to precedent controlling authorities, resulting in overly-broad application of the three criminal statutes at issue to the associated narrow private rights of action.

PLEASE TAKE FURTHER NOTICE that pursuant to Fed. R. Civ. Proc. 54(b), as well as Local Rule 7-9, this Motion is timely, as a partial summary judgment “is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” *See*, Fed. R. Civ. Proc. 54(b).

MEMORANDUM OF POINTS AND AUTHORITIES

Facebook, Inc. (“Plaintiff”) brought an action against Defendants alleging violations of the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM Act” or “the Act”), 15 U.S.C. §§ 7701 *et seq.*, the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030, and California Penal Code § 502 (“CPC § 502”). In the interest of advancing proper adjudication of this matter while the case remains pending as to damages and the liability of the individual defendant, Defendants hereby address the errors in this Court’s analysis and judgment

1 of the elements of these serious and seldom pleaded criminal claims in this civil context. Judicial
 2 economy urges reconsideration based on:

3 1. The Court incorrectly applied the law as it relates to private action and erred in finding the
 4 email messages at issue were *materially misleading* in violation of the CAN-SPAM Act.

5 2. The Court incorrectly and detrimentally overlooked the critical issue of data ownership in
 6 its CFAA and CPC § 502 analyses in finding violations based on “unauthorized access” of data
 7 that Facebook did not own.
 8

9 3. The Court incorrectly classified Plaintiff’s purported damages in determining Plaintiff’s
 10 standing to bring each of the three claims at issue and erred in finding Plaintiff to have standing.

11 **A. THE MESSAGES AT ISSUE DO NOT VIOLATE THE CAN-SPAM ACT BECAUSE**
 12 **THEY CLEARLY DISCLOSE DEFENDANT POWER’S INFORMATION AS TO**
 13 **ENABLE RECIPIENTS AND ISPs TO IDENTITY AND CONTACT POWER.**
 14

15 The Act provides that “header information shall be considered *materially misleading* if it
 16 fails to identify accurately a protected computer used to initiate the message because the person
 17 initiating the message knowingly uses another protected computer to relay or retransmit the
 18 message *for purposes of disguising its origin.*” 15 U.S.C. § 7704(a)(1)(C) (*emphasis added*). A
 19 false or misleading statement is considered “material” if “the alteration or concealment of header
 20 information” would *impair the ability of an IAS provider or a recipient to “identify, locate, or*
 21 *respond* to a person who initiated the electronic mail message.” *Id.* § 7704(a)(6).
 22

23 Here, the presence of ample information identifying Power.com as the “host” of the
 24 Facebook event that was forwarded by Facebook users to their friends enabled Facebook, as well
 25 as users, to identify, locate or respond to Defendants without any delay or further investigation.
 26 Indeed, Power’s campaign was launched for the sole purpose of attracting more users to join its
 27 social media aggregation site. Thus, it did not—and would have no reason to—disguise its
 28

1 identity or origin. This fact alone distinguishes this case from each case upon which Plaintiff
 2 bases their claims and removes the messages at issue from regulation as intended by Congress¹.

3 In its Order, this Court appears to make conclusive Defendant Power's liability based on
 4 the statute's provision that *misleading header information* is *per se* violation of the Act (Dkt. No.
 5 275 at 13:7), but it wholly fails to analyze whether such defect was *materially* misleading within
 6 the meaning and intent of the CAN-SPAM Act. Plaintiff offers no proof that any headers have
 7 been altered to impair a recipient's ability to identify, locate, or respond to the person who
 8 initiated the email, and no complaints were reported by recipients. *See*, Dkt. No. 275, 8:7-12.

10 In determining whether a material factual dispute exists, substantive law shall identify not
 11 only which facts are material but also which facts are critical and which are irrelevant. *Anderson*
 12 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248. Here, there is case law informing on the requirement
 13 that messages at the subject of a CAN-SPAM civil action not only be misleading but, specifically,
 14 *materially* misleading. 15 U.S.C. § 7704(a)(1) (*emphasis added*). The Court erred when it found,
 15 in considering the evidence in the light most favorable to the non-moving party, there was
 16 evidence beyond a question of fact warranting summary judgment, as it did not find the messages
 17 to be *materially misleading* within the meaning and intent of the CAN-SPAM Act.

19 **B. DEFENDANTS DID NOT VIOLATE THE CFAA AND CPC § 502 BECAUSE**

21 **DEFENDANTS HAD AUTHORIZED ACCESS FROM THE DATA OWNERS.**

22 The Court erred in considering the alleged "hacking" of Facebook's network with respect
 23 to the CFAA and CPC § 502 (the California corollary to the CFAA²), which are laws ultimately

25 ¹ "If the alleged inaccuracies in a message containing so many valid identifiers could be described
 26 as 'materially false or materially mis- leading,' we find it hard to imagine an inaccuracy that
 27 would not qualify as 'materially false or materially misleading.' Congress' materiality
 requirement would be rendered all but meaningless by such an interpretation. *Omega World*
Travel v. Mummagraphics, Inc., 469 F.3d 348 (4th Cir., 2006) at 358.

28 ² *See, generally, Multiven, Inc. v. Cisco Sys. Inc.*, 725 F.Supp.2d 887, 2010 WL 2889262 (N.D.
 Cal., 2010).

1 concerned with protecting ownership of data. Defendant Power was not only expressly granted
 2 permission, but actually instructed, by each owner to access their personal information on
 3 Facebook. The question of “unauthorized access” has been a focus of this Court³, but Plaintiff
 4 never established—and this Court has never found—that the accessed data at issue is proprietary
 5 to Plaintiff and, thus, fraudulently procured, as required under the CFAA and CPC § 502.

7 The relevant provision of the CFAA provides criminal penalties for anyone who:
 8 “knowingly and *with intent to defraud*, accesses a protected computer without authorization, or
 9 exceeds authorized access, and by means of such conduct *furtheres the intended fraud and obtains*
 10 *anything of value....*” 18 U.S.C. § 1030(a)(4) (*emphasis added*). Section 1030(a)(4) clearly
 11 requires intent to defraud and obtain a thing of value, which cannot be established in the present
 12 case since the thing “taken” was users' personal information to which Plaintiff had no proprietary
 13 rights and, thus, was of no legal value to Plaintiff. Even if the Court finds that users' data was of
 14 some value to Plaintiff, users' lawful sharing and Defendants' subsequent access to said data
 15 posed no threat to Plaintiff's value since 1) Defendants did not destroy or otherwise impair the
 16 data in any way, and 2) Plaintiff did not have ownership, let alone exclusive ownership, to users'
 17 personal information. There may be a relevant statute under which Facebook could claim
 18 damages for unauthorized access to data it does not own, but such claims are unsupported here.

21 **C. PLAINTIFF DOES NOT HAVE STANDING TO BRING THESE CLAIMS BECAUSE**
 22 **THEY HAVE NOT SUFFERED HARM SUFFICIENT TO BRING PRIVATE**
 23 **ACTIONS UNDER THE CAN-SPAM ACT, CFAA OR CPC § 502.**

24 This Court erred in finding Plaintiff has standing to bring a private action under the CAN-
 25 SPAM Act because Plaintiff did not suffer damages sufficient to grant them standing under the
 26

28 ³ See, generally, Court Orders at Dkt. Nos. 89 and 275.

1 Act. The *Gordon* court identified relevant damages establishing standing⁴, and Plaintiff suffered
 2 none of these harms. Instead, Plaintiff deliberately mischaracterized their claimed “damages” of
 3 \$5,543 for 3-4 days’ salary for one engineer to “investigate” the alleged spamming⁵, which was
 4 clear from the messages themselves, and \$75,000 in legal fees to initiate litigation, which they
 5 colored as “investigative costs” incurred by “Cutler’s Firm” (better known as Perkins Coie LLP,
 6 who was Plaintiff’s outside counsel at the time). Such self-imposed fees to investigate and litigate
 7 a competitor’s use of their system does not qualify as “harm” under any interpretation or
 8 application of the Act.

10 Further, Plaintiff has not established standing under CFAA or CPC § 502 because they
 11 have not established that their network suffered disruption or slowdown⁶. To allege a loss under
 12 the CFAA, "plaintiffs must identify impairment of or damage to the computer system that was
 13 accessed without authorization." *See, AtPac, Inc.*, 730 F. Supp. 2d at 1184. In *Farmers*, the Court
 14 confirmed that "[c]osts not related to computer impairment or computer damages are not
 15 compensable under the CFAA." *See Farmers Ins. Exch. v. Steele Ins. Agency, Inc.* (E.D. Cal.,
 16 2013) at 721. Thus, Plaintiff's claim for attorney and engineer "investigation" fees, as described
 17 above, could not be considered compensable and, thus, not confer standing under the CFAA.

19 CONCLUSION

20
 21 For the reasons presented herein, Defendants respectfully ask permission from this Court
 22 to file their motion for reconsideration of the February 16, 2012 Order for Summary Judgment.

23
 24 ⁴ The costs of investing in new equipment to increase capacity, customer service personnel to
 25 address increased subscriber complaints, increased bandwidth, network crashes, and the
 26 maintenance of anti-spam and filtering technologies as the “sorts of ISP-type harms” that
 Congress intended to confer standing. *See, Gordon v. Virtumundo, Inc.*, 575 F.3d 1040 (9th Cir.,
 2009) at 1053.

27 ⁵ *See*, Declaration of Ryan McGeehan, Dkt. No. 213-4.

28 ⁶ The CFAA defines "loss" as "any reasonable cost to any victim, including the cost of responding
 to an offense... incurred *because of interruption of service*" 18 U.S.C. § 1030(e)(11)
 (*emphasis added*).

[PROPOSED] ORDER

Good cause appearing, Defendants' motion for leave to file a motion for reconsideration is hereby GRANTED.

IT IS SO ORDERED.

Dated:

By: _____
Honorable Lucy H. Koh
United States District Court Judge

I hereby certify that this document(s) has been or will be filed through the ECF system, and notice will be sent via the following method(s):

I declare under penalty of perjury under the laws of the State of California that the above statements are true and correct.

By: /s/
Amy Sommer Anderson